U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue date: 31Aug2001

Case No.: 2000-INA-0018

In the Matter of:

EVA ROSENSTEIN,
Employer,

on behalf of

ALICJA BUTKIEWICZ
Alien.

Appearance: Claimant Pro Se.
Certifying Officer: Dolores Dehaan, Region II

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the

requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

This case arises from an application for labor certification filed by Eva Rosenstein on January 28, 1997, seeking labor certification for Alicja Butkiewicz, Alien, for the position of Cook/Household/live-out (AF 23). Employer required that applicants have 8 years grade school, 4 years high school and 2 years experience in the job offered. The duties of the job were described as follows:

> Prepare and cook Jewish kosher meals including: Cholent, Kreplach, Stuffed Cabbage, Pirogen, Borscht, Chremsel, Matzo Balls, Gefilte Fish Kosher Carp, Bake Chalias. Serve meals. Purchase foodstuff.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on May 28, 1999, on two grounds. First, the CO states that it could not be determined that a bona fide full-time job opportunity exists to which U.S. applicants could be referred, in violation of 20 C.F.R. § 656.20(c)(8). The CO required the Employer to document that a full-time job opportunity actually exists in the Employer's household instead of having created the job solely for the purpose of qualifying the alien as a skilled worker under the immigration laws. To document that a full time job exists, the CO required the Employer to document her answers to a series of 12 questions. Second, the CO found that the ethnic cooking requirements are not normal for the job in the United States in violation of 20 C.F.R. § 656.21(b)(2). The CO required the Employer to document that these requirements arise from business necessity. In proving business necessity, the CO required the Employer to document that a cook with 2 years of experience could not readily adapt to Jewish Style Kosher cooking, that an applicant with no prior Jewish Style Kosher cooking experience is incapable of preparing such food, and to document why the Employer could not provide training or instruction in Jewish Style Kosher cooking. Additionally, the CO required the Employer to document that the job as currently described existed before the employer filed this application, with documentation to include payroll records, receipts, etc. (AF 49).

Employer submitted rebuttal on June 30, 1999, which consisted of a 3 page letter from the Employer, an entertainment schedule from December 1995 through November 1996, and Employer's 1995 federal income tax return. (AF 68).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued a Final Determination denying certification on August 19, 1999, on the grounds that the Employer failed to prove that a full-time job exists which is open to U.S. workers, in violation of § 656.20(c)(8). The CO also denied certification on the grounds that the Employer has not documented that an applicant with 2 years of cooking experience could not readily adapt to Jewish Kosher style cooking. (AF 75).

Employer requested review of the denial on September 20, 1999 (AF 77). An order was issued on October 28, 1999, requiring the parties to submit legal briefs on the grounds for appeal. However, a brief was not submitted. Therefore, the grounds stated by the Employer in the request for review are treated as her brief.

Discussion

Subsequent to the request for review, the Board has considered the issue of special cooking requirement in domestic cook cases. In *Martin Kaplan*, 2000-INA-23 (BALCA July 2, 2001) (*en banc*), the Board reviewed three applications involving domestic cooks with job requirements for experience in specific styles or types of cuisine (Kosher, Vegetarian, Polish). The Board held that cooking specialization requirements for domestic cooks are unduly restrictive within the meaning of the regulation at 20 C.F.R. §§ 656.21(b)(2), and therefore must be justified by business necessity pursuant to the test found in *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). The Board also held that cooking specialization requirements for domestic cooks normally should be analyzed under the business necessity standard of 20 C.F.R. §§ 656.21(b)(2) prior to their consideration as a factor under the *bona fide* job opportunity analysis of 20 C.F.R. §§ 656.20(c)(8). *See Carlos Uy III* , 1997-INA-304 (Mar. 3, 1999)(*en banc*).

In the instant case, the CO clearly required the Employer to document the business necessity for the Kosher requirements. In so doing, the CO required the Employer to document that a cook with 2 years of experience could not readily adapt to Jewish Style Kosher cooking, that an applicant with no prior Jewish Style Kosher cooking experience is incapable of preparing such food, and to document why the Employer could not provide training or instruction in Jewish Style Kosher cooking, and that the job as currently described existed before the employer filed this application, with documentation to include payroll records, receipts, etc.

The Employer's response[2] states that she did not employ a domestic cook in the home before "three years ago" as her mother-in-law did all of the cooking until she passed away. Thereafter, Employer states that they have used the services of restaurants and catering businesses. However, she indicates that documentation of such with receipts is impossible with so many adult members of the family purchasing food. Further, the sum total of Employer's "documentation" of business necessity is her letter which states that,

Requirement of experience in the Jewish kosher style cooking tradition arises entirely

[2] The Employer's response primarily addressed the issue of whether a bona fide job exists.

> from business necessity. 80-85 per cent of our clients are of Jewish descent, who are accustomed to Jewish specialties. They do not eat non kosher food at all. Our business depends on those customers.
>
> May of them would certainly not accept the food prepared by a cook without experience in kosher style cooking. Our goal is to satisfy our clients upon whom our business depends. We can not take a risk of lower than expected standard of entertaining.
>
> Nobody in our family is able to teach and train the alien in Jewish style cook. I certainly have no spare time for that.

(AF 67).

As we held in *Kaplan*, *supra*, we take official notice that Kosher is a "Hebrew term meaning 'fit,' 'in proper condition,' as a designation for ritually pure things, especially food permitted to be used in accordance with the [Jewish] dietary laws." (*The New Jewish Encyclopedia*, p.275; *Webster's II New Riverside University Dictionary*, P. 669.) "There is no such thing as 'kosher-style' food. Kosher is not a style of cooking. Chinese food can be kosher if it is prepared in accordance with Jewish law, and there are many fine kosher Chinese restaurants in Philadelphia and New York. Traditional Ashkenazic Jewish foods like knishes, bagels, blintzes, and matzah ball soup can all be non-kosher if not prepared in accordance with Jewish law. [*Kashrut*]" (*Judiaism* 101: *Kashrut: Jewish Dietary Laws*, p.1.)

The Employer has not submitted any documentation that the family follows the laws of Kashrut. Therefore, the application is no different from one for any other kind of specific cooking specialization and must be treated accordingly.

The NOF in this case specifically required the Employer to document that a cook with 2 years of experience could not readily adapt to Jewish Style Kosher cooking, that an applicant with no prior Jewish Style Kosher cooking experience is incapable of preparing such food, and to document why the Employer could not provide training or instruction in Jewish Style Kosher cooking. Other than stating that no one had time to train a cook in Kosher style cooking, the Employer did not respond to this requirement.

Accordingly, we find that the Employer has not established the business necessity for 2 years of experience in Kosher style cooking.

Order

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel: A

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.